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FINANCIAL PLANNING & SMSF SPECIALISTS

ESTATE PLANNING INFORMATION SHEET

The Roles in a Will, Testamentary Trust and Enduring Power of Attorney

There are a number of technical terms that appear throughout estate planning documentation including a will and a testamentary trust. To assist with your understanding of these in the consideration of your wishes for your estate planning purposes, we have provided a summary of the common terms below.

Will

Executor–An executor is a person or entity that you choose to carry out the terms of and wishes recorded in your will. The executor is required to:

- *Obtain authority to administer the estate*-apply to the Supreme Court for the authority to deal with the deceased's estate. This is referred to as obtaining 'probate of the will'.
- *Value the estate*-identify and account for all assets and liabilities. Each item then requires written confirmation from banks, financial institutions, insurance companies, share registers, titles office and creditors.
- *Complete income tax returns*-Before an estate can be distributed to beneficiaries, it is necessary to obtain a clearance from the Australian Taxation Office.
- *Pay all debts*-Creditors, funeral expenses, income tax, fees for administering the estate and out-of-pocket expenses must all be paid. This may require the executor to sell some assets.
- *Divide the estate*-when all debts have been paid, the executor is then free to distribute the remaining assets according to the directions laid out in the will by you.
- *Look after the estate*-ensure that all assets including property and investments are safe and protected, and arrange insurances for this purpose, if necessary.
- *Establish trusts*-when a will directs the assets to a testamentary trust, the executor transfers the assets to the trustee at the end of the probate process, and the trustee takes over handling the assets for the benefit of the beneficiaries according to the instructions in the trust (and sometimes, the will).

Given the amount of work and complexities that can be involved in this role, serious consideration should be given before entrusting this task to a family member or friend who may not have the capacity, time or expertise that could be necessary.

Alternate Executor–In the event the Executor is unable or unwilling to act in his capacity as Executor, the person named as the Alternate Executor inherits the responsibilities otherwise designated to the named Executor. Multiple persons can be named as joint Alternate Executors.

Beneficiary–In the context of a will, a beneficiary is one to whom the will-maker may leave a portion of his/her estate. The will-maker may also nominate **default beneficiaries**, who may receive a benefit in the event that a beneficiary is incapable of receiving a benefit.

Default Beneficiary– A default beneficiary receives a benefit that would otherwise have passed to a beneficiary in the first instance, if and when a beneficiary is not alive or is otherwise incapable of receiving that benefit. Typically, the default beneficiaries may receive a benefit when the named beneficiaries are deceased.

Guardian–A guardian is a person or persons appointed as such in the will to care for children under the age of 18 of the will-maker or other persons whom the will-maker is guardian/carer (such as perhaps adult disabled children). The will-maker can also include wishes or directions in the will to the guardian such as that "all children of mine are to live together until they attain the age of 18 years" or "I wish for all of my children to attend private school education until at least the age of 18 years".

Testamentary Trust

Trustee–Simply put, trustees are to trusts what executors are to wills. In other words, just as the executor of a will carries out the instructions in the will, the trustee of a trust is the person who carries out the instructions in the trust. In doing so, the trustee is subject to a number of legal duties of the highest standard: he or she must adhere to the terms of the trust, always act in the interests of the beneficiaries, act fairly by the beneficiaries, remain impartial, maintain proper accounts, exercise prudence, adhere to profits and conflicts rules and disclose information to beneficiaries. The trustee has the ultimate discretion (choice) as to who, when, what and how of the beneficiaries receive income and capital of the trust. Therefore, the trustee should be a person whom you know, and whom you trust to act in the best interests of your nominated beneficiaries.

Alternate Trustee- In the event the Trustee is unable or unwilling to act in their capacity as Trustee, the person named as the Alternate Trustee inherits the responsibilities otherwise designated to the named Trustee. Multiple persons can be named as joint Alternate Trustees.

Appointor–The appointer has the power to appoint or remove the trustee. Generally, the appointer will have the power to appoint other people or entities to replace or to act additionally with the trustee. As such, this is an important office because the appointor effectively controls the trustee and, therefore, controls the trust. This role is sometimes termed, "the controller of the trust".

In some circumstances, it may be pertinent to appoint more than one appointor so that there is some check and balance in this role and so that one person does not in and of themselves hold all of this power. Where more than one appointor is nominated, the powers are generally to be exercised "jointly".

Beneficiary–A beneficiary receives a benefit (income and/or capital assets) from the trust. This is similar to a beneficiary under a will, however, rather than receiving these benefits from the estate directly, they are directed via a testamentary trust. A beneficiary can be a natural person or any other entity. Beneficiaries of a testamentary trust can be certain named persons or a class of persons(i.e. a certain family group). The trustee still ultimately has the discretion as to which of those beneficiaries (and in what proportions) receive such benefits.

Default Beneficiary– A default beneficiary receives a benefit that would otherwise have passed to a beneficiary in the first instance, if and when a beneficiary is not alive or is otherwise incapable of receiving that benefit. Typically, the default beneficiaries may receive a benefit when the named beneficiaries are deceased.

Enduring Power of Attorney

An enduring power of attorney can be useful because you may become unable to look after things for yourself at some stage in the future. This could be due to physical problems, loss of mental capacity or something unforeseen such as an accident. Making an enduring power of attorney while you still have mental capacity is a cheap, easy and practical step to prepare for the future. Once you have lost the mental capacity to understand what you are doing, you cannot make a power of attorney. By making an enduring power of attorney, there will be someone who can legally look after your legal and financial affairs if you become unable to do so. Another advantage of making an enduring power of attorney is that you can choose the person who you want to be your attorney.

Principal: Person who makes a power of attorney giving someone else the authority to manage the principal's legal and financial affairs.

Attorney: Person with the principal's authority to manage the principal's legal and financial affairs.

Power of Attorney: A document signed by the principal that gives the attorney the authority to manage the principal's legal and financial affairs.

Prescribed forms: Forms to create an enduring power of attorney as set out in the Powers of Attorney Regulation 2011. The forms became available for use from 13 September 2013 following amendments to the Powers of Attorney Act 2003 and the Powers of Attorney Regulation 2011. The amendments were made to make it easier for a person to make a power of attorney while at the same time providing increased security measures against fraudulent acts by an attorney.

Prescribed witness: Person who is a solicitor, barrister, Registrar of a Local Court, licensed conveyancer, NSW Trustee & Guardian employee or Trustee company employee who has successfully completed a course of study approved by the Minister.

Loss of mental capacity: When a principal makes or revokes a power of attorney, loss of mental capacity means the loss of the ability to understand the nature and effect of that action. When a principal cannot manage his or her legal affairs, loss of mental capacity means being unable to carefully consider and decide issues relating to accommodation, bills, food, clothing, banking, investments and the like. If there is any doubt, seek legal or medical advice.

Jointly: Where two or more attorneys are appointed they must act together e.g. both attorneys must sign documents.

Joint and several: Where two or more attorneys are appointed they can act individually or together e.g. one of the attorneys can sign a document without the other attorney's signature or agreement.

Vacates office: An attorney vacates office if the attorney dies, resigns, becomes bankrupt, loses mental capacity or the authority to act is revoked.

An enduring power of attorney can be tailored to meet your circumstances. You can make special directions in the power of attorney document about what you want your attorney to be able to do or impose limits on what they can do. There are additional requirements when using this form:

- The attorney (and any substitute attorney) has to sign the form to show that they consent to act. This can occur at the same time as you sign or at a later time. However, the enduring power of attorney will not begin to operate until the attorney has signed.
- Your signature must be witnessed by a special witness (called a 'prescribed witness').

The prescribed witness must sign a certificate on the form stating that they explained the enduring power of attorney to you and that you appeared to understand it.

Explanation of Simple Wills & Wills with Testamentary Trusts

These notes are intended for use by clients to help create a will for them.

The two most commonly used wills are as follows: -

1. **A will for a couple with all adult children or no children** is a simple will that leaves everything you own to your family in accordance with a simple formula. If you die prematurely everything is left to your spouse. If you and your spouse both die prematurely, your will leaves everything to your children or any other beneficiaries that you choose.

   This is a deliberately simple and very natural approach that suits 99% of clients who are married and have all adult children or no children. For clients with minimal assets and relatively simple affairs, a simple will is a perfectly sensible way to proceed because it is straight forward and easy to understand. If you are concerned about asset protection for the beneficiaries of your estate or you would like the beneficiaries to take advantage of potential tax benefits in receiving their inheritance by distributing income or capital to others, you may want to consider establishing a testamentary trust as part of this will. This is discussed further below.

2. **A will for a couple with children under 18** is a slightly more complex will that leaves everything you own to a testamentary trust for the benefit of a surviving spouse and children. This has the advantage of better protecting the surviving spouse and your children in the long term and also has potential taxation benefits for future income distributions from the trust.

Even if you do not have children under 18 you can still opt for the slightly more complex option of a testamentary trust to give greater protection for the surviving spouse and your children in the long term. Similarly, if you do have children under 18 then you can still opt for the simpler option if the advantages of protection and potential taxation benefits are of less importance to you.

Of course, if the above two options do not suit you in any way; we can tailor your estate planning documents to suit your specific circumstances.

Frequently Asked Questions

1. Does my super form part of my Will?

Normally, upon the death of the member of a superannuation fund the trustees of the fund pay the member's benefit to the spouse, dependent children or someone of their choosing. This is a discretionary power held by the fund trustees. Your superannuation will not automatically be included in you restate. If you wish to nominate the beneficiaries of your superannuation, you may be able to complete a binding death benefit nomination form (**BDBN**) with your superannuation fund. Once completed and accepted by the superannuation fund, this form will essentially dictate how your superannuation should be dealt with when you pass away. Some superannuation funds do not allow BDBNs, in which case you can complete a non-binding death benefit nomination form. This form is non-binding on the trustees of the superannuation fund, however, it will still serve the purpose of communicating your wishes to the trustees.

You do not have to complete a BDBN and, if fact, completing a BDBN can sometimes restrict the payment (including the most tax efficient payment) of superannuation death benefits and / or pensions being paid from superannuation on death. If you do not have a valid BDBN in place on your death, the trustee(s) of your superannuation fund will have the choice of who to pay your superannuation to and in what proportions. The trustee(s) choice, in these circumstances, is governed by the terms of the superannuation fund deed and Superannuation Law. Generally, the trustee(s) can only distribute your superannuation to your spouse, your children, your legal personal representative (your estate) and / or any other person who is dependent upon you.

There are broadly three ways that benefits in a superannuation fund can be distributed, namely:-

a) a lump sum payment to a dependant or the estate;
b) the continuation of a pension to a reversionary beneficiary; and
c) establishment of a new pension from the fund.

2. Can I give away my insurance through my will?

If you hold any life insurance policies the nominated beneficiary under the policy will receive the insurance upon your death. This insurance **does not** form part of your will. You can easily nominate you beneficiaries in the insurance policy. If there is no nominated beneficiary and you own the policy the insurance proceeds **will** form part of your estate upon your death.

3. Can I give away jointly owned properties under my will?

A property (i.e. your home or investment property) owned jointly (as opposed to as tenants in common) cannot be given away under your will. Pursuant to the law of survivorship, the property will pass away to the surviving co-owner automatically irrespective of the will. However, if the property is owned as tenants in common, either in equal shares(i.e.50/50) or in unequal shares(i.e.30-70) then this property will form part of your estate and can be distributed through your will.

If you are unsure about how your property is held then you could ask your bank for a copy of your title or we ca n search your property title to find out.

4. Can I confer my assets on my de facto or same-sex partner under my will?

Yes you can. Under the current laws, a same sex partner or defacto partner is in a similar position to a married spouse. Accordingly, you can give your defacto or same sex partner assets under your will. Further, you can consider registering your relationship (same sex or heterosexual domestic relationship). Registration gives the couple formal recognition of their relationship in Victoria (similar provisions can be found in other States).A standard relationship certificate provides conclusive evidence of the relationship, making it easier for a partner to benefit under a will without having to prove their relationship. The certificate also means that they will not need any further evidence that their relationship exists for other official purposes. Registration of a domestic relationship under the *Relationships Act 2008(Vic)* is also acknowledged by the Commonwealth.

Please contact us if you would like to know more about registering your relationship.

5. What are Testator Family Maintenance (TFM) Claims?

If you fail to make appropriate provisions in your will for a dependant then that dependant can make a claim for a share in your estate on your death. If one of your dependants expected to be a beneficiary under your will and believes they have not been adequately provided for in your will, they may be able to bring a claim under Part IV of the Administration and Probate Act 1958 (Vic). This is known as a testator family maintenance claim (**TFM claim**).

It is possible for the following people to commence a TFM claim upon your estate: your surviving spouse or defacto partner, your children (including ex-nuptial, adopted and stepchildren), your parents, a divorced spouse who is receiving or entitled to receive maintenance from you at the date of your death and **any other person** for whom you have a responsibility to provide. Therefore, it is advisable to adequately provide the proper maintenance and support to such persons that you have a 'responsibility' to provide for.

If a TFM claim is made, the court must take into account the following in determining the application:-

a) any family or other relationship between the deceased person and the applicant, including the nature of the relationship and, where relevant, the length of the relationship;
b) any obligations or responsibilities of the deceased person to the applicant, any other applicant and the beneficiaries of the estate;

c) the size and nature of the estate of the deceased person and any charges and liabilities to which the estate is subject;
d) the financial resources (including earning capacity) and the financial needs of the applicant, of any other applicant and of any beneficiary of the estate at the time of the hearing and for the foreseeable future;
e) any physical, mental or intellectual disability of any applicant or any beneficiary of the estate;
f) the age of the applicant;
g) any contribution(not for adequate consideration) of the applicant to building up the estate or to the welfare of the deceased or the family of the deceased;
h) any benefits previously given by the deceased person to any applicant or to any beneficiary;
i) whether the applicant was being maintained by the deceased person before that person's death either wholly or partly and, where the Court considers it relevant, the extent to which and the basis upon which the deceased had assumed that responsibility;
j) the liability of any other person to maintain the applicant;
k) the character and conduct of the applicant or any other person; and any other matter the Court considers relevant.

6. What happens to my overseas assets?

If you have overseas assets, you can include instructions in your Australian will about the distribution of your overseas assets to your preferred beneficiaries. However, it is advisable to draft a will in the country you have the assets, to ensure the appropriate distribution of those overseas assets when you pass away. Since the overseas assets are located in a different country with its own laws, rules and regulations, it will be wise to draft a will in that specific country. We encourage you to consult local solicitors in relation to this matter.

7. What are Mutual Wills?

Mutual wills act as a contract between parties and are usually made by separate documents in which two or more persons execute separate wills to leave his or her property to the surviving one, and then the survivor is to leave the property to the beneficiaries that have been mutually agreed upon between each other. The terms of the mutual wills can be altered or revoked by agreement between the parties. However, upon the death or incapacity of one of the parties, the terms of the mutual will can no longer be revoked or altered. The law will protect the second beneficiaries of the deceased's will (for example, your children) against the survivor revoking their will after your death.

8. What are Mirror Wills?

Mirror wills are wills that are identical to each other. However, these differ from mutual wills in that the persons making these wills may revoke or alter their wills at any time.

Explanation of Enduring Powers of Attorney in New South Wales

An Enduring Power of Attorney is a legal document that allows decisions to be made that take into account your wishes, if you're not able to make them for yourself, for example, in the event of losing capacity by reason of sudden illness.

You can choose a person to act on your behalf to make these decisions. You can make an **Enduring Power of Attorney** by appointing someone to make financial and legal decisions on your behalf, such as signing a legal document, selling property or doing your banking, if you are unable to make these decisions at some point in the future.

The person who is given the power of attorney (EPOA) is known as the attorney.

Frequently Asked Questions

1. What is the criteria for making an EPOA?

In order to make an EPOA, you need to meet the following requirements:-

1. You must be 18 years of age or over; and
2. You must have sufficient legal capacity to make the appointment (including that you cannot be bankrupt).

Here, legal capacity means you have the ability to reason things out. You possess the ability to understand, retain, believe, evaluate and judge relevant information.

In other words, at the time of making the EPOA, you must be able to understand things like:

- what sort of powers the attorney will have;
- what sort of decisions they will have the authority to make;
- when and how will they have the authority to exercise that power;
- the impact that their power could have on you and the things that are important to you; and
- how to cancel or change the arrangement in the future.

You do not need to undergo any examinations to prove capacity. You are deemed by law to have legal capacity once you turn 18. However, for all Enduring POAs, witnesses have an obligation to check your capacity by asking questions to ensure that you understand the document you are signing and the powers you are granting to the attorney. If you do not have the capacity to make an informed decision at the time of signing of the EPOA, then that EPOA will be invalid.

2. What points need to be considered when choosing an Attorney?

While choosing an attorney you should appoint someone who:-

- you can trust;
- can act according to your interests and not their own;
- is likely to be able to take on the role when needed;
- is happy to take on the role;
- will listen to what you want and respect your preferences even after you have lost legal capacity; and
- is able to take on the role.

3. How do you amend or cancel an EPOA?

You can revoke a EPOA at any time when you have legal capacity by completing a Revocation form revoking the attorney's power:

- telling the attorney that their power is withdrawn;
- destroying the document and any copies; or
- putting it in writing or filling in a revocation form.

Your EPOA is also automatically revoked upon:

- your death;
- your marriage;
- revocation by the Guardianship Tribunal;
- an attorney becoming bankrupt, losing capacity or dying;
- the resignation of the attorney

Generally, your attorney will decide whether you have lost capacity. They may be assisted by your doctor or health care service.

4. How many witnesses are needed for an EPOA?

Only one witness is needed to witness the signing of the EPOA, however the witness must be a New South Wales solicitor, barrister, Registrar of a Local Court, licensed conveyancer, NSW Trustee & Guardian employee or Trustee company employee who has successfully completed a course of study approved by the Minister. The witness, called a **prescribed person** must explain the powers, give appropriate legal advice and witness the signing of the documents.

5. Can I appoint more than one Attorney?

Under the *Powers of Attorney Act 2003*, you can appoint more than one decision-maker who can act jointly (they must make all decisions together and sign all documents together) or jointly and severally (any one of them can make a decision and sign documents together or without the others).

Appointing more than one decision-maker can help you get a balanced outcome. For example, if you choose someone who knows what you would want but they do not have financial knowledge, you could have a second attorney who is a financial expert, such as an accountant. However, if you appoint two people jointly it can slow down the decision-making process.

6. Do I lose my rights making an EPOA?

No. Making someone your attorney does not mean that you lose your right to operate your bank account, deal with your real estate or exercise any other rights that you have. You can continue to look after your money and property while you still have mental capacity to do so.

7. What can my attorney do?

With some exceptions, and depending on what limits or conditions you impose, your attorney can do all the things that you can do with your legal and financial affairs. For example, an attorney can sell, lease or mortgage your house, sell your personal belongings, take money out of your bank accounts, gain access to your documents (other than your will) and sell your shares. The prescribed forms allow you to impose limits or conditions on the attorney's authority. It is important to understand that anything your attorney does for you under this power, as long as it is legal, is binding on you. For example, if your attorney lawfully enters into and signs a mortgage on your behalf, the law will see it as if you have signed the mortgage documents yourself. In such a case you will be liable to repay the mortgage, not your attorney. More generally, an attorney cannot vote in an election or make health or other personal decisions for you. Also, your attorney cannot carry out your duties as trustee for someone else.

8. What are my attorney's obligations?

An attorney is under a duty to act in your best interests, except as specifically authorised in the power of attorney document. An attorney must:

- keep the attorney's money and assets separate from your money and assets (unless you and your attorney are joint owners or operate joint bank accounts)
- keep proper accounts and records of how the attorney handles your money and assets.

The NSW Trustee & Guardian, or anyone interested in your welfare, can require the attorney to produce these accounts and records. If the attorney does not carry out the obligations properly, they may have to compensate you. It is also possible that a transaction by the attorney may be cancelled, or that the power of attorney will be terminated or the attorney replaced. Except where the power of attorney document says otherwise, the attorney cannot be paid for his or her work as attorney, although they can claim any out of-pocket expenses directly connected with carrying out their duties as your attorney.

The attorney should keep receipts to prove these costs. If a solicitor, the NSW Trustee & Guardian or a trustee company is appointed as attorney, the power of attorney document may contain a clause allowing them to charge a fee for acting or this may be covered by a separate agreement.

9. Can my attorney use my money for gifts?

An attorney cannot make any gift of your money or property unless the power of attorney form specifically allows the attorney to do so. When creating an Enduring Power of Attorney you can opt for a clause authorising an attorney to give reasonable gifts. If this is allowed for the attorney will be able to use your money to make only certain types of gifts. Allowable gifts are gifts to a relative or close friend of yours of a seasonal nature (for example, birthday, Christmas or other religious occasion) or because of a special event (for example, birth or marriage). Also permitted are donations of the kind that you have made before or might reasonably be expected to make (for example, to a favourite charity). However, the value of the gift or donation must be reasonable having regard to your financial circumstances and the size of your estate.

Can my attorney use my money for their own benefit or the benefit of others?

As with gifts, an attorney cannot use your money for their own benefit, or the benefit of any other person, unless the power of attorney form specifically allows the attorney to do so.

Can I use a NSW power of attorney outside NSW?

If you want to use a NSW power of attorney outside NSW, you should check what the requirements are in the place where you want to use it. This applies to both general and enduring powers of attorney. Some Australian states and foreign countries have different requirements. You should also check whether they have such a thing as an enduring power of attorney and what their requirements are for making and registering one.

10. Do I have to register my power of attorney?

You must register your power of attorney if your attorney is going to sell, mortgage, lease or otherwise deal with your real estate. Otherwise, it is not necessary to register it. However, by registering your power of attorney it will be:

- on record as a public document
- safe from loss or destruction
- more easily accepted as evidence that your attorney is allowed to deal with your legal and financial affairs.

Powers of attorney are registered at the Sydney office of Land and Property Information. Anyone can lodge it for registration – either you, your attorney or someone else. Private individuals outside the Sydney Metropolitan area only can post powers of attorney. The original power of attorney and a photocopy of it should be taken to:

Land and Property Information
1 Prince Albert Road
Queens Square
Sydney NSW 2000

You will also need to pay the current registration fee. At LPI, the staff will stamp a number on the original power of attorney and return it to you. This number is evidence that the power of attorney has been registered. Your attorney should use this number when they sign a document on your behalf. Your power of attorney will be digitally scanned and placed on public record, for anyone to see.

11. Do I need to pay stamp duty on EPOA?

In NSW, it is not necessary to pay stamp duty on enduring powers of attorney.

Craig Smith & Associates Document Holding Service

Craig Smith & Associates advise our clients to hold their estate planning documents in a secure place where it can be readily accessible if required.

We offer a complimentary service where we will hold your original estate planning documents i.e. wills, testamentary trusts, enduring powers of attorney etc. in our safe and make certified copies available to eligible persons as required at no charge.

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